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Inheritance Rights of Cryogenically-Preserved "Preembryos": An Analysis of *Davis v. Davis*[1]

I. INTRODUCTION

Science and technology are continually advancing. The legal world must keep pace with the evolving scientific world in order to adequately address new moral and legal issues spawned by the discoveries of science. Legal rights are potentially changed, created or destroyed by scientific advancements. Often, the impact of changing technology on the law is not instantly apparent. The complexities of a new discovery are usually exposed slowly through conflicts with legal rules established to fit the world before such a discovery.

A good example of a clash between new technology and established law is the 1992 Tennessee case, *Davis v. Davis*.[2] This case involved cryogenics, the new technology of freezing fertilized human ova for later implantation.[3] The Supreme Court of Tennessee, ruling on the legal status of the frozen ova, accepted the name "preembryo" for the ova and concluded that the ova occupied an interim category entitling them to "special respect".[4] The legal implications of this technology may seem slight on the surface, but below lurks a myriad of new legal issues. Each issue may influence longstanding policies and purposes of existing laws governing the affected area.

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1. 842 S.W.2d 588, (Tenn. 1992), *cert. denied*, 61 U.S.L.W. 3581 (U.S. Feb. 22, 1993) (No. 92-910).

2. *Id.*

3. The process of cryogenic preservation involves freezing the fertilized ova in nitrogen and then storing them at sub-zero temperatures to preserve them for later implantation. *Id.* at 592.

4. *Id.* at 597.

It is reasonable to assume that the decision in *Davis* was influenced by the current debate over abortion. Either the pro-choice argument or the pro-life argument could be strengthened by a determination of the Tennessee Supreme Court in their favor. In order to avoid favoring one side over the other, the court created an intermediate category that would not be of great impact to either side of the debate. While avoiding the entanglements of the abortion issue, the court has created great confusion in many other areas of law that may be involved with preembryos.

This note will examine the decision in *Davis* and analyze how the court's disposition of the frozen fertilized eggs could impact the current laws of wills and trusts. Section II will give a background of the *Davis* case. Section III will examine beneficiary rights, if any, that preembryos may have in a trust agreement. Consideration will be given to statutory as well as common law decisions. Section IV will discuss the rights that frozen fertilized ova may have under laws governing testamentary dispositions and intestate succession. Issues will be raised and possible solutions will be examined in both areas.

II. BACKGROUND OF THE *DAVIS* CASE

Mary Sue and Junior Lewis Davis were married in April of 1980.[5] After several unsuccessful attempts at having children, Mary Sue underwent surgery, related to her reproductive problems, that left her incapable of conceiving a child naturally.[6] As an alternative, the Davises decided to try "in vitro fertilization" ("IVF")[7] Because the IVF process was very painful for Mary Sue, the couple decided to inseminate several ova and have them cryogenically preserved for later attempts at implantation. After an unsuccessful implantation attempt the Davises were left with seven unused frozen embryos.[8]

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5. *Id.* at 591.

6. *Id.*

7. In vitro fertilization "involves the aspiration of ova from the follicles of a woman's ovaries, fertilization of these ova in a petri dish using the sperm provided by a man, and the transfer of the product of this procedure into the uterus of the woman from whom the ova were taken." *Id.*

8. Davis v. Davis, No. E-14496, 1989 WL 140495, at *3 (Tenn. Cir. Sept. 21, 1989).

In February of 1989, Junior Davis filed for divorce.[9] The only complication in the divorce proceedings was determining how to dispose of the seven frozen embryos.[10] Unfortunately, the Davises failed to execute a written agreement dictating how to dispose of any unused embryos.[11] The trial court reviewed the testimonies of several scientists and doctors knowledgeable in the IVF field. After hearing evidence regarding the distinction made in the medical field between embryos and preembryos, the trial court refused to recognize the term "preembryo", claiming that the word created a "false distinction" between the two terms.[12] Instead, the trial court concluded that the frozen embryos were "human beings" and not property.[13] Accordingly, Mary Sue was given custody of the embryos so she could bring the "children" to term through implantation.[14]

Junior Davis then appealed the trial court's decision, and the Tennessee Court of Appeals reversed the decision regarding the proper disposition of the preembryos.[15] The court of appeals remanded the case to the trial court with orders "to enter a judgement vesting Mary Sue and Junior with joint control of the fertilized ova and with equal voice over their disposition."[16]

The Tennessee Supreme Court granted review of the case "because of the obvious importance of the case in terms of the development of law regarding the new reproductive technologies."[17] The Supreme Court of Tennessee stated that the conclusion by the Court of Appeals left the impression that the rights which Junior and Mary Sue had in the frozen ova were, "in the nature of a property interest."[18] The court also overruled the decision of the trial court and

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9. Davis v. Davis, 842 S.W.2d 588, 592 (Tenn. 1992).
10. *Id.*
11. *Id.* at 590.
12. In rejecting the use of the term the trial court quipped "What's in a name? that which we call a rose By another name would smell as sweet." Davis v. Davis, No. E-14496, 1989 WL 140495, at *7 (Tenn. Cir. Sept. 21, 1989) (quoting Romeo and Juliet (Act II, Scene II)).
13. *Id.* at *9.
14. *Id.* at *11.
15. Davis v. Davis, No. 180, 1990 WL 130807 (Tenn. App. Sept. 13, 1990); 59 U.S.L.W. 2205.
16. Davis v. Davis, No. 180, 1990 WL 130807 at *3.
17. Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).
18. *Id.* at 596.

accepted the scientific term "preembryo" to describe the frozen fertilized ova.[19]

The positions of both Junior and Mary Sue have shifted since the original divorce proceeding. Both have remarried and Mary Sue wishes to donate the preembryos to a childless couple rather than use them herself.[20] Junior Davis is opposed to any such donation and would rather have the preembryos discarded.[21] The Tennessee Supreme Court was called upon to decide whether the preembryos should properly be considered persons in the custody of Mary Sue, as the trial court held, or property held in joint control of both Junior and Mary Sue, as the court of appeals held.[22]

The Tennessee Supreme Court agreed with the court of appeals that the preembryos could not be considered "persons" under either Tennessee or federal law.[23] However, the court did not agree with the treatment given the preembryos by the court of appeals. The high court concluded that the preembryos were neither persons nor property, but rather occupied "an interim category of special respect because of their potential for human life."[24]

The decision of the Tennessee Supreme Court in the *Davis* case creates a new category of "matter" that lies between a living person and inanimate property. The creation of this new category could alter various areas of the law that are somehow connected to, or involved with preembryos, the only known member of this category requiring "special respect." The remainder of this note will discuss the possible effects this may have in the areas of wills and trust law.

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19. The term encompasses the time from when the ovum is fertilized to about fourteen days, at which time the cells begin to differentiate into separate distinguishable body parts. *Id.* at 593.
20. Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992).
21. *Id.*
22. *Id.* at 594.
23. *Id.* at 595.
24. *Id.* at 597.

III. THE EFFECT OF SPECIAL RESPECT FOR PREEMBRYOS ON THE LAW OF TRUSTS

The status given preembryos by the Tennessee Supreme Court creates a category not yet treated in the law of trusts. Many questions will arise as to if, or when, preembryos become involved in trust transactions. Although the *Davis* decision is not binding outside of Tennessee, it will most likely be persuasive authority in later preembryo litigation because of the case's ground-breaking nature. For discussion purposes, the fact situation in *Davis* will be used as a model for discussing the problems presented in this note.

A. Preembryos as Trust Beneficiaries

In order to create a valid trust agreement, there must be "a beneficiary who is definitely ascertained at the time of the creation of the trust, or definitely ascertainable within the rule against perpetuities."[25] Under the Restatement (Second) of Trusts, an unborn child will be allowed as a beneficiary so long as "the interest is to vest in the child within the period of the rule against perpetuities."[26]

1. Ascertainability of preembryos: Requirement of definiteness

The *Davis* decision gave no indication of whether a preembryo would be considered "definitely ascertainable" as a beneficiary, as required by trust law. In *Morsman v. Commissioner*,[27] the United States Court of Appeals for the Eighth Circuit stated that the legal and equitable title of trust property is not separated when the sole beneficiary, or group of beneficiaries, is non-existent, therefore, a valid present trust cannot be created. However, an immediate resulting trust will be created "with an express trust for

25. F.P.P. Enters. v. United States, 646 F. Supp. 713, 717 (D. Neb. 1986). *See also* RESTATEMENT (SECOND) OF TRUSTS § 112 (1959). Section 112 is entitled "Definite Beneficiary Necessary" and states, "A trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities."

26. RESTATEMENT (SECOND) OF TRUSTS § 112 cmt. d (1959).

27. 90 F.2d 18 (8th Cir.), *cert. denied*, 302 U.S. 701 (1937).

the child springing up when and if such child ever materializes."[28]

While a beneficiary must be clearly identified, this need not be done by name.[29] *Morsman* concerned a trust in which the testator named his issue as beneficiaries. At the time of the trust the testator had no issue.[30] It has been held that, "the term 'issue,' unless otherwise limited or qualified, embraces all lineal descendants of the settlor."[31] More succinctly stated, "issue" includes all biological descendants unless there are "clear expressions of a contrary intent."[32] Under these definitions, all preembryos will be the issue of their gamete donors. Since there is no requirement that the child be born, the preembryo will retain this status through out preservation.

How do preembryos fit into the reasoning of *Morsman*? The court stated, "[w]here the beneficiary is in being, the beneficial interest may be vested in him though its enjoyment be postponed."[33] Does the interim category they have been assigned in *Davis* give them the status of "in being"? *Morsman* further held that a suit could be maintained for a beneficiary who has been "born or *conceived*."[34] Under this reasoning, a preembryo, having passed the point of conception, would have rights as a beneficiary. This conclusion could be contested on the basis that when *Morsman* was decided in 1937, the court did not contemplate such a situation. Therefore, *Morsman* is not likely to be applied to cases involving preembryos.

2. Determination of the rule against perpetuities

The rule against perpetuities has been defined as "a positive mandate of law, to be obeyed irrespective of the question of intention; and, apart from resort to lives in being (*plus the possible period of gestation*) as the standard for measuring the period of time for postponement of the

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28. *Id.* at 24 (quoting BOGERT, TRUSTS AND TRUSTEES § 163).
29. First Nat'l Bank in Ord v. Schroeder, 383 N.W.2d 755, 757 (Neb. 1986) (quoting 76 Am.Jur.2d Trusts § 135 at 377 (1975)).
30. *Morsman*, 90 F.2d at 23.
31. Bonney v. Granger, 356 S.E.2d 138, 142 (S.C. Ct. App. 1987) (citations omitted).
32. Powers v. Wilkenson, 506 N.E.2d 842, 848 (Mass. 1987).
33. *Morsman*, 90 F.2d at 25.
34. *Id.* (emphasis supplied).

vesting of a future estate."[35] The rule is sometimes very confusing, but *Melcher* also gives a "universally accepted short definition" that is suitable for most purposes in this note.[36] The shortened rule states, "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[37]

There is a difficult paradox when the rule is applied in situations that involve preembryos. The scientific evidence offered in *Davis* stated that the preembryos could be preserved for a period of two years.[38] However, if cryogenic technology improves to the point where preembryos can be preserved indefinitely,[39] some important questions will need to be answered. For example, should a preembryo be considered a "life in being?" Added weight is given to answering in the affirmative when the gestation period noted in the rule's more expansive definition given in *Melcher* is considered.[40]

If preembryos with an indefinite life are considered lives in being, then it is conceivable that an interest may never vest, but always have the possibility of vesting. Accordingly, the rule could not be used to invalidate a trust in this situation. Furthermore, preembryos could be used to circumvent the Rule Against Perpetuities by allowing trust property to be held perpetually without violating the rule. This outcome is in direct conflict with the purpose of the rule, namely, to prevent perpetual control by the dead, and allow the living to put such property to good use.[41]

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35. Melcher v. Camp, 435 P.2d 107, 108 (Okla. 1967) (emphasis supplied).
36. *Id.* at 111.
37. *Id.* (quoting GRAY, THE RULE AGAINST PERPETUITIES, at 191 (4th ed. 1942)).
38. *Davis*, 842 S.W.2d at 590.
39. This situation is reasonably imaginable. The treatment of the preembryos in the present case alone demonstrates that the two year limit has already been surpassed. The Davis preembryos were frozen on December 10, 1988. *See Davis v. Davis*, No. E-14496, 1989 WL 140495, at *3 (Tenn. Cir. Sept. 21, 1989). The case was denied certiorari by the United States Supreme Court in February 1993, where implantation was still considered a possibility. *Davis v. Davis*, 113 S. Ct. 1042 (1993). This demonstrates the medical clinic's belief that the preembryos were still viable even after being frozen for over four years. Furthermore, the Tennessee Supreme court noted that between the time the case was first instituted, and the time the case reached the state supreme court, technology had improved to the point where preembryos could be preserved for ten years. *Davis*, at 842 n.22.
40. 435 P.2d at 108.
41. JESSE DUKEMINIER, *Wills, Trusts and Estates*, 761 (4th ed. 1990).

To preserve the rule, a special standard must be set for dealing with preembryos. It would be necessary to examine the intent of the settlor concerning the preembryos. This would create a flexible rule, in contrast to the statement in *Melcher* calling the rule, "a positive mandate of law, to be obeyed irrespective of the question of intention."[42] Furthermore, holding the trust invalid through enforcement of the Rule Against Perpetuities could divest a preembryo of the "postponed" enjoyment[43] of the resulting trust discussed in *Morsman*.[44] The resulting trust could spring into an express trust if a preembryo ever came to term.[45] There may not be a satisfactory answer at this time, but perhaps future technology will help provide us with a suitable rule — hopefully less complicated than the Rule Against Perpetuities — to deal with this problem.

B. Protection of Preembryo Trust Interests

As discussed above, under the letter of present laws, preembryos can take an interest in trust as beneficiaries. These rightful interests need to be protected should anyone try to sever them. Even an irrevocable trust can be modified or revoked with the consent of the settlor and all the beneficiaries.[46] If a preembryo is determined a valid beneficiary of a trust, the interest it possesses needs to be protected. Obviously, the preembryo is unable to seek protection on its own. The Federal Rules of Civil Procedure provide for the protection of infants and incompetents through the use of a guardian ad litem.[47] Under the rules, discretion is left to the courts to determine whether a guardian ad litem should be appointed.[48]

In *Morsman*, the court discussed the practice of appointing a guardian stating, "[i]t is true that a guardian may be appointed for an unborn child which is in esse."[49] However the court reasoned, "it is difficult to understand how such an appointment can be made for a child not yet conceived

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42. *Melcher*, 435 P.2d at 108.
43. *Morsman*, 90 F.2d at 25.
44. *Id.* at 24.
45. *Id.*
46. Hatch v. Riggs Nat'l Bank, 284 F. Supp. 396, 396-97 (D.D.C. 1968).
47. FED. R. CIV. P. 17(c).
48. *Id.*
49. *Morsman*, 90 F.2d at 25 (citations omitted).

where there is no other basis of jurisdiction."[50] Theoretically, the court in *Morsman* may simply have found that since the preembryos were already conceived, they could have a guardian appointed to them. The court concluded, however, that a present interest was needed for a guardian to be appointed.[51] Under the ruling in *Morsman*, the preembryos are not allowed a guardian ad litem because unborn beneficiaries do not have a present interest.[52] The reasoning and decision of *Morsman* was later contradicted by the decision in *Hatch v. Riggs Nat'l Bank*,[53] which stated that modification or revocation of even an irrevocable trust can be carried out with the consent of the settlor and all of the beneficiaries. Although it did not expressly overturn *Morsman*, the court held that the rights of the unborn could be protected by a guardian ad litem appointed by the court.[54] The *Hatch* court noted that the power to appoint a guardian was granted in rule 17(c) of the Federal Rules of Civil Procedure. The court reasoned that the purpose of the rule is to protect the interests of infants and incompetents.[55] Using the policy reasons behind rule 17(c), the court concluded that, "[t]he same considerations which allow appointment of a guardian ad litem for minors or incompetents apply with respect to an unborn person."[56]

The interim position given to preembryos strengthens their legally protected position in the law. They are more than merely unborn beneficiaries, and in some respects they could be considered "in being", since they are actually in existence. They have also passed the threshold test of conception.[57] For these purposes, preembryos should be given some type of protection when their interests are threatened.

IV. THE POSSIBLE EFFECTS OF PREEMBRYOS ON THE LAW OF WILLS

Preembryos will probably cause future reform in the law of wills. Consideration of testamentary trusts is sufficiently

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50. *Id.*
51. *Id.*
52. *Id.* at 25-26.
53. 284 F. Supp. 396 (D.D.C. 1968).
54. *Id.* at 399.
55. *Id.*
56. *Id.*
57. *See, e.g., Morsman*, 90 F.2d at 25.

covered in the discussion above. The primary problem under testamentary law will be the level of specificity used in testamentary documents. As discussed below, much of the accustomed language used in preparing a testamentary document will take on new and expanded meaning.

A. Use of the terms "heirs" and "issue"

It is common for the term "heirs" to be used in testamentary documents. The term has been held to mean "those who would, under the statute of distribution, be entitled to the personal estate" of the testator.[58] This definition will not cause a problem if preembryos are only used by the gamete donors. They will rightfully take a position as heirs when the donor/testator dies. However, if the preembryos are donated, as was attempted in *Davis*,[59] are they the heirs of the gamete donors, or of the individuals, to whom they are donated? Does it make a difference if the preembryos are sold instead of donated?

Similar questions are raised concerning a testator's "issue." This term is also used in many testamentary documents. As discussed above, issue includes all "biological descendants" unless a contrary intent is clearly stated.[60] In a testamentary document "'issue' or 'lawful issue' . . . are to be construed as words of limitation to the inheritance equivalent to the technical expression 'heirs of the body.'"[61] Under these definitions, it appears that preembryos are issue only of the gamete donors, regardless of donation.

Allowing testamentary rights to frozen embryos could pose an unwanted financial burden on a gamete donor who is against donation or implantation. Junior Davis was opposed to donation of the Davis preembryos. The court stated that donation resulting in gestation and birth of the preembryos would impose "possible financial and psychological consequences,"[62] but did not state what these financial burdens might entail. It is possible that the court was referring

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58. Cotton v. Cotton, 61 S.W.2d 655, 656 (Tenn. 1933).

59. *Davis*, 842 S.W.2d at 590 (Tenn. 1992).

60. *See supra* note 34 and accompanying text (citing Powers v. Wilkenson, 506 N.E.2d 842, 848 (Mass. 1987)).

61. Riggs Nat'l Bank v. Summerlin, 445 F.2d 201, 204 (D.C. Cir.) (citations omitted), *cert. denied*, 404 U.S. 851 (1971).

62. *Davis*, 842 S.W.2d at 604.

to some sort of support obligation. It is also feasible that these financial responsibilities could come from the possibility of future inheritance rights for the preembryos.

There may be protection against the use of "issue" in a testamentary document. It has been held that the court can examine the will itself to give the word the meaning intended by the testator.[63] This requires a person to employ clarity in drafting his or her will.

Some of the problems pertaining to preembryos can be eliminated by using specific language in the disposition of property in one's will. Failure to treat "heirs" and "issue" with specificity could lead to unpleasant and unforeseen results in cases involving preembryos.

B. Adoption of Preembryos

Another possible solution is to let the adoption laws govern the donation or transfer of preembryos. "The effect of adoption is to terminate the rights of the natural parents."[64] If governed by adoption laws, the rights of a preembryo with respect to the natural parents will also be terminated.[65] If one of the gamete donors adopts the preembryo with a different spouse, however, adoption by the new spouse would not sever the right to inherit from the ex-spouse gamete donor.[66]

Equitable adoption is another possible method of governing the transfer of preembryos. The doctrine of equitable adoption recognizes an adoption in equity even when no formal adoption has occurred. As an equity doctrine, it can be applied as justice requires.[67] Equitable remedies of this type may prove very useful in structuring laws to deal with preembryos, despite the fact that only the adoptee can enforce an equitable adoption.[68] As discussed above, a guardian ad litem may enforce this action if the preembryo has not yet gone to term, or is still in its infancy.[69]

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63. *Summerlin*, 445 F.2d at 205.

64. L.F.M. v. Department of Social Servs., 507 A.2d 1151, 1160 (Md. Ct. Spec. App. 1986).

65. UNIFORM PROBATE CODE § 2-114(b) (1990).

66. *Id.* §§ 2-114(b)(i) & (ii).

67. *See, e.g.*, Burdick v. Grimshaw, 168 A. 186, 188 (N.J. Ch. 1933).

68. In re Estate of Riggs, 440 N.Y.S.2d 450, 452 (N.Y. Surr. Ct. 1981).

69. *See supra* notes 47-48 and accompanying text at page 11; *See also* Peoples Nat'l Bank v. Barlow, 112 S.E.2d 396, 399 (S.C. 1960) (assigning a guardian ad

C. *Pretermittant Statutes*

If adoption of preembryos is not allowed, most states have statutes to protect pretermitted children. Pretermittant statutes generally allow a child who is inadvertently left out of a will, including those unborn at the time the will is executed, to take a share equivalent to what he or she would take under intestate succession.[70] Thus, preembryos could receive protection under these statutes as an unborn child.

The purpose of these statutes has been stated as, "to guard against the unintentional omission of the decedent's natural heirs from a share in the estate due to oversight, accident, mistake or an unexpected change of condition."[71] The equivalent federal statute also includes children born after execution of the will.[72] It has been stated that an after-born child needs to be "'in esse,'— at least conceived" prior to the death of a testator.[73]

It has been held that a child born after the death of a male intestate is presumed "in esse" from the time of conception, and capable of taking his or her share of the estate.[74] This presumption is only valid for 280 days, or ten lunar months after the testator's death.[75] The 280 day limit is used because it is considered the necessary term for pregnancy.[76] This time limit presumption is not valid when preembryos are concerned.[77] As stated above, a preembryo can be conceived and not brought to term for several years. Consequentially, this time presumption would preclude preembryos from recovering their rightful share of the estate. Fortunately, the court in *Byerly* made the presumption

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litem in a will dispute).

70. *See, e.g.*, In re Estate of Jones, 759 P.2d 345, 348-49 (Utah Ct. App. 1988) (quoting Utah Code Ann. § 75-2-302(1)(1978)).

71. Smith v. Crook, 206 Cal. Rptr. 524, 525-26 (Dist. Ct. App. 1984) (citations omitted).

72. UNIFORM PROBATE CODE § 2-302(a) (1990). Subsection (a) states, "if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate."

73. Vogel v. Mercantile Trust Co. Nat'l Ass'n, 511 S.W.2d 784, 789 (Mo. 1974).

74. Byerly v. Tolbert, 108 S.E.2d 29, 35 (N.C. 1959) (quoting 16 Am.Jur., Descent and Distribution § 80, pp. 851-52).

75. *Id.*

76. *Id.*

77. *See supra* note 40 and accompanying text.

rebuttable if there is "evidence tending to show that intestate was in fact the father of the child.[78] New technology,[79] as well as good record keeping, will make the presumption easily rebuttable in preembryo cases.

It would not be a breach of logic to allow preembryos to inherit under pretermittant statutes, since the statutes are designed to protect those unable to protect themselves. The special respect status given them in *Davis* could logically include protection of inheritance rights. In order to alienate a preembryo from its interest, a testator must expressly disinherit them.[80] Failure to do so could cause great uncertainty in the disposition of the estate. It may be necessary to wait until all of the preembryos have been implanted or destroyed before the estate can properly be distributed.

V. CONCLUSION

As science progresses, so must the law. Not only are new twists put on present law, but advancing technology creates the need for whole new areas of law. Many new domains created by modern technology will undergo experimentation by legislators and policy makers to determine how they could best be governed.

In *Davis v. Davis*,[81] a new intermediate category was established between property and person. The decision helped the Tennessee Supreme Court avoid conflict with the current abortion issue. While avoiding the abortion issue, this decision will undoubtedly cause confusion and uncertainty in other areas of law that deal with preembryos. Instead of trying to fit the new category into the existing codes, laws need to be created to deal specifically with the new category. Until these laws are determined, however, there will be great uncertainty in the legal ramifications of preembryo rights. For example, what impact will *Davis* have on the abortion issue? And, if someone breaks in and steals preembryos, is it larceny or kidnapping? Should a new crime be developed for this situation? These questions are

78. *Tolbert*, 108 S.E.2d at 35.

79. For example, the technology of DNA mapping can be used to assist in determining paternal relationships.

80. *Smith*, 206 Cal. Rptr. at 526.

81. 842 S.W.2d 588 (Tenn. 1992).

beyond the scope of this note, but may well arise at a later time.

For the present time, many problems could be avoided in testamentary and trust cases involving preembryos by requiring disposition contracts to be drawn up when a couple initiates in vitro fertilization. Using specificity when preembryos are involved will also help avoid complications until adequate laws can be devised to govern this new territory.

This note has examined how one technological advancement has affected small portions of only two areas of the law. It has merely scratched the surface of the potential impact that this decision may have. Although not binding outside of Tennessee, because of its ground-breaking nature the *Davis* decision is certain to be influential in other jurisdictions that deal with these issues. The Tennessee Supreme Court should have considered the broad impact of their decision more closely, rather than being concerned with the possible impact of the case on the single issue of abortion.

Steve Murphy